

The Senate

Standing Committee on
Education, Employment
and Workplace Relations

Building and Construction Industry
(Restoring Workplace Rights) Bill 2008

November 2008

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Government Senators' Majority Report

1.1 On 3 September 2008, the Senate referred the Building and Construction Industry (Restoring Workplace Rights) Bill 2008 (the bill) to this committee for report by 30 November 2008. As 30 November is a Sunday the committee is reporting early.

Provisions

1.2 The bill, a private senator's bill introduced by Senator Rachel Siewert seeks to repeal the Building and Construction Industry Improvement Act 2005 (BCII Act) and the Building and Construction Industry Improvement (Consequential and Transitional) Act 2005 in their entirety. A consequence of the repeal of the BCII Act is the abolition of the office of the Australian Building and Construction Commissioner (ABCC).

1.3 Senator Siewert explained the rationale for the bill as follows:

...These laws are some of the most pernicious ever to have passed through this place. They strip away internationally recognised rights of workers in the building and construction industries. This bill is intended to ensure such laws no longer exist in Australia.¹

1.4 Further consequences not identified in the second reading speech are the abolition of the Office of the Federal Safety Commissioner (FSC)² and the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme³ which will be addressed later in the report.

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper calling for submissions by 10 October 2008. Details of the inquiry and the bill were placed on the committee's website. The committee also directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions. 15 submissions were received as listed in Appendix 1.

1.6 The committee decided to prepare its report on the basis of the submissions received and thanks those who assisted by providing submissions to the inquiry.

Background

1.7 The bill is familiar ground for this committee. In 2003 the government introduced the Building and Construction Industry Improvement Bill 2003 which

1 Senator Rachel Siewert, Second Reading Speech, *Senate Hansard*, 28 August 2008, p. 3983.

2 Master Builders Australia (MBA), *Submission 5*, p. 2.

3 MBA, *Submission5*, p. 8.

lapsed in the Senate when Parliament was prorogued for the 2004 election. The committee produced a report in June 2004 covering the 2003 bill and industry related matters.⁴ In 2005 the Building and Construction Industry Improvement Bill 2005 was introduced and passed as the current BCII Act. The committee reported on the 2005 bill in May 2005.⁵

Committee comment

1.8 The submissions revisit a number of key issues dealt with by this committee during the consideration of the BCII Act in 2005 and its predecessor in 2003. The committee majority stands by the findings of the committee majority report in 2004 and the Opposition senator's report in 2005. This report does not replicate previous reports, although it will provide reminders of past committee findings.

1.9 The issues raised in submissions are well known to the committee as are the positions of the various stakeholders. However, this bill has provided the committee with another opportunity to reflect on the assumptions underlying the BCII Act. Three years have passed since the establishment of the ABCC and the committee has considered this issue with the benefit this time has provided.

1.10 Detailed background on the construction industry and the introduction of the BCII Act is available from the two reports produced by this committee in 2004 and 2005. This report will provide only a brief section on background. For those who may be unfamiliar with the history of the bill, greater detail is provided in the committee's 2004 and 2005 reports.

Final report of the royal commission

1.11 The office of the ABCC was established under the BCII Act and commenced operation on 1 October 2005. The ABCC was part of the government's response to the Cole royal commission into the building and construction industry which presented its findings to Parliament in 2003. Cole found there was an urgent need for cultural and structural reform. He identified unlawful conduct at the centre of the findings as well as widespread inappropriate conduct and recommended specific industry legislation.⁶

4 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004, available from: http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2002-04/building03/index.htm.

5 Senate Employment, Workplace Relations and Education References Committee, *Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, May 2005, available from: http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/buildingbills/index.htm.

6 *Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, 24 February 2003, p. 6.

1.12 The royal commission findings were controversial. Submissions from employer organisations pointed to the importance of these findings to understand the current regulatory arrangements in the industry and the necessity for their continuation.⁷ Representative of employer comments, the Australian Mines and Metals Association (AMMA) stressed 'the findings of the royal commission remain relevant considerations and highlight the necessity of retaining the BCII Act and ABCC as a measure to achieve enduring cultural change in the building and construction industry'.⁸

1.13 The Cole findings were not accepted without question. The exercise was seen by many as politically motivated and directly aimed at weakening the unions representing employees in the industry.

1.14 The Combined Construction Unions (CCU) argued that the commission was a highly politicised process motivated by ideological opposition to the construction unions and was used to provide the justification for a range of anti-union measures. The CCU further argued that the focus, processes, findings and recommendations were highly contentious and profoundly flawed.⁹ The CCU contended that:

Any reasonable examination of the provenance of the BCII Act would support the view that it is steeped in the same ideology that gave rise to WorkChoices. The BCII Act is the most extreme expression of that ideology.¹⁰

1.15 Professor George Williams and Nicole McGarrity in their submission reminded the committee of the resolution of the ACTU Congress in 2003 which stated:

The report reflects the anti-union nature of the proceedings, the focus of which was on presenting unions in the worst possible light, while denying them any adequate opportunity to counter allegations made by employers and counsel assisting the Commission.¹¹

1.16 In the 2003 resolution the ACTU noted that:

The majority of the 392 findings of unlawful conduct against organisations and individuals concern technical breaches of the Workplace Relations Act by unions and their officials. Some of these findings were based on alleged incidents occurring up to seven years ago. Most findings concerned ordinary industrial issues relating to matters such as right of entry and adherence to disputes procedures and reflecting, to a large extent, the

7 AMMA, *Submission 4*, p. 3.

8 AMMA, *Submission 4*, p. 12.

9 CCU, *Submission 13*, p. 2.

10 CCU, *Submission 13*, p. 2.

11 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

unsatisfactory state of the current industrial law and its application to the industry.¹²

1.17 The resolution also highlighted that very few findings were made against employers. It countered that conclusions such as unions habitually ignore Commission and Court orders, were made on the basis of little evidence. Non-compliance with an order was found in only five disputes, involving in total seven individuals and three unions. The resolution concluded that the Commission did not establish any evidence of union misconduct, whether criminal or industrial, to justify a vicious attack on the unions' ability to organise and bargain.¹³

1.18 Williams and McGarrity cited work by John Howe which supported the view that the focus of the ABCC is on restricting trade union activities rather than investigating unlawful activities of employers.¹⁴

1.19 Williams and McGarrity also pointed out that not only the findings but also the process used by the royal commission was criticised. They noted the concerns put forward at the time of the inquiry in 2004 by the Victorian Council for Civil Liberties and the CFMEU regarding the departure from established rules of evidence and procedure.¹⁵

1.20 In their submission to this inquiry, the ACTU noted the use of the royal commission to justify the existence of the BCII Act. In response they highlighted the findings of the committee majority report in 2004 regarding the royal commission which are summarised below.¹⁶

1.21 In the 2004 report, the committee majority report questioned the purpose and findings of the Cole royal commission:

The Cole royal commission wasted its time in chasing demons rather than looking at the commercial characteristics of the industry which determine the nature of its labour needs...¹⁷

12 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

13 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

14 Professor George Williams and Nicola McGarrity, *Submission 6*, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law*, p. 246.

15 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 249–250; and Senate Employment, Workplace relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, pp. 39–42.

16 ACTU and TLCs, *Submission 15*, pp. 3–4.

17 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. xvi.

and

The committee has looked at the same industry as Commissioner Cole, but sees it in a vastly different light, as do so many authorities and specialists involved in some way with the industry.¹⁸

1.22 Witnesses before the 2004 inquiry argued that the decision to establish a royal commission on the building and construction industry was an inherently political act. Legal practitioners and others told the committee that, being part of an executive process, royal commissions could never enjoy the same measure of independence as a court.¹⁹

1.23 The majority report concluded that they could have no confidence that the findings were fair or accurate.²⁰ The only point of agreement between the then government's position and the findings of the Senate inquiry was that there was room for further reform in the building and construction industry.²¹

Conclusion

1.24 Attitudes to the Cole royal commission findings continue to influence opinion in regard to the BCII Act and the ABCC.

1.25 As noted earlier, in previous reports, the committee acknowledged the need for reform in the building and construction industry, with due regard for the complexity of issues, to address practices which were clearly unacceptable. The real question is whether industry specific legislation was required. Should this industry be treated singularly and differently to other industries? The committee will keep this question in mind as the report turns, in chapter two, to the issues raised with the committee in relation to the functions and powers of the ABCC and then in chapter three, the question of whether these are warranted for one section of the workforce.

18 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 1.

19 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, pp. 36–37.

20 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 50.

21 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 1.

Chapter 2

2.1 This chapter covers issues raised in submissions about the functions and powers of the BCII Act and the ABCC.

2.2 The committee majority notes that on 22 May 2008, the government announced the appointment of the Honourable Murray Wilcox QC to consult with the industry and report on how best to transform the ABCC to a specialist division of Fair Work Australia.¹ The department noted that as consultations by Mr Wilcox are continuing, it would be inappropriate for them to pre-empt the outcome of that process, due to be reported by the end of March 2009.² The issues raised in a discussion paper released by Mr Wilcox will be referred to in this report where relevant.

Functions of the ABCC

2.3 As recommended by the Cole royal commission, the industry is now subject to specific legislation, the *Building and Construction Industry Improvement Act 2005*, which is monitored and enforced by the ABCC. This operates alongside the general framework for workplace relations regulation under the *Workplace Relations Act 1996*.

2.4 The purpose of the Building and Construction Industry Improvement Act 2005 (BCII Act) is to:

...provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.³

2.5 Chapter 2, Part 1, section 10 of the BCII Act establishes the ABCC with the responsibility for a range of activities including:

- monitoring and promoting appropriate standards of conduct for building industry participants, including by
 - monitoring and promoting compliance with this Act and the Workplace Relations Act; and
 - monitoring and promoting compliance with the Building Code; and
 - referring matters to other relevant agencies and bodies;

1 Fair Work Australia will be the new independent umpire which will oversee Labor's new industrial relations system. See election policies 2007, Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, 'Labor's New Industrial Umpire Fair Work Australia'.

2 DEEWR, *Submission 3*, p. 1.

3 *BCII Act 2005*, p. 3.

- investigating suspected contraventions, by building industry participants, of:
 - this Act, the Workplace Relations Act or an award, certified agreement, AWA or order of the AIRC; and
- the Building Code;
- instituting, or intervening in, proceedings in accordance with this Act;
- providing assistance and advice to building industry participants regarding their rights and obligations under this Act and the Workplace Relations Act;
- providing representation to a building industry participant who is, or might become, a party to a proceeding under this Act or the Workplace Relations Act, if the ABC Commissioner considered that providing the representation would promote the enforcement of this Act or the Workplace Relations Act;
- disseminating information about this Act, the Workplace Relations Act and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants;
- any other functions conferred on the ABC Commissioner by this Act or by another Act;
- any other functions conferred on the ABC Commissioner by the regulations.⁴

Powers of the ABCC

2.6 The ABCC has wide ranging powers to monitor, investigate and enforce the legislation and the National Code of Practice for the Construction Industry (the code).

2.7 Submissions raised issues in regard to the exercise of these powers. Employer organisations see the powers as necessary to safeguard a productive and industrially peaceful building and construction industry. Organisations such as AMMA believe the powers have been instrumental in effecting change in the building and construction industry and that they are adequately balanced by the protections afforded under the BCII Act.⁵

2.8 Others see the powers as extraordinary. Professor George Williams for instance, argued the powers are unwarranted, create a disturbing precedent and have been created without adequate safeguards. Professor Williams and Nicola McGarrity provided the committee with a detailed peer-reviewed legal analysis of the coercive and investigatory powers of the ABCC. As this provides a very detailed analysis of these powers, the issues raised in this submission will be detailed below.

4 *BCII Act 2005*, pp. 13–14.

5 AMMA, *Submission 4*, p. 4.

Investigatory Powers

Power to compel information, documents or give evidence

2.9 Section 52 of the BCII Act gives the ABCC the power to compel a person to provide it with information or documents or to give evidence before it. The Act states:

(1) If the ABC Commissioner believes on reasonable grounds that a person:

(a) has information or documents relevant to an investigation; or

(b) is capable of giving evidence that is relevant to an investigation;

the ABC Commissioner may, by written notice given to the person, require the person:

(c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or

(d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or

(e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.⁶

2.10 Williams and McGarrity criticised the ABCC's powers under section 52. They pointed to the low investigatory threshold of 'relevant to an investigation' which could be used to require a person to reveal their phone, email and bank account records or to undertake a 'fishing expedition' or 'roving inquiry'. The guidelines for the exercise of compliance powers state the ABC Commissioner must have 'belief on reasonable grounds' that the threshold has been met. Williams and McGarrity noted that the proper use of the investigatory powers is thus dependent upon the discretion and goodwill of the holder of the power and pointed out that:

This is at odds with the rule of law principle that a power should be limited by law to its justifiable uses and not left subject to the discretion of whoever uses it.⁷

Ability to override other laws

2.11 Williams and McGarrity also noted that neither the privilege against self-incrimination nor the provisions of other laws, such as secrecy laws enable a person to avoid the investigatory powers. Section 53 details the excuses not available in relation to section 52 and states:

6 *BCII Act 2005*, s 52, p.46.

7 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 257.

(1) A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:

- (a) would contravene any other law; or
- (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
- (c) would be otherwise contrary to the public interest.⁸

2.12 The ACTU highlighted that section 53(1) infringes basic civil liberties, including the right to silence.⁹

2.13 Williams and McGarrity argued that section 52(7) is particularly remarkable as it states:

The operation of this section is not limited by any secrecy provision of any other law (whether enacted before or after the commencement of this section), except to the extent that the secrecy provision expressly excludes the operation of this section.¹⁰

2.14 They noted that this section enables the investigatory powers to 'override, for example, the protection of journalists' sources, privacy law and even the confidentiality of Cabinet proceedings'.¹¹ It also overrides national security laws relating to the gathering of intelligence by ASIO. They concluded that this provision:

...elevates the ABCC, and its objective of eliminating unlawful conduct in the building and construction industry, above even the protection of national security.¹²

2.15 The ACTU supported the comments made by Professor Williams and added that such powers are excessive when dealing with extensively regulated contractual arrangements between employees, their representatives and employers.¹³

Legal representation

2.16 Section 52(3) provides that a person appearing before the ABCC is entitled to legal representation.¹⁴ However, Williams and McGarrity noted that in *Bonan v Hadgkiss*, the Federal Court found that it was appropriate to prevent a legal representative from acting for more than one person giving evidence to the ABCC.

8 *BCII Act 2005*, p. 48.

9 ACTU, *Submission 15*, p. 9.

10 *BCII Act 2005*, p. 47.

11 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

12 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

13 ACTU, *Submission 15*, p. 11.

14 *BCII Act 2005*, p. 46.

They expressed concern that despite section 52(3), out of the 121 people examined by the ABCC from 1 October 2005 to 30 September 2008, only 67 have been legally represented.¹⁵

Exceptions to protections

2.17 Section 53(2) provides some protection of the rights of people providing evidence or giving information and documents to the ABCC through the conferral of 'use' and 'derivative use' immunities.¹⁶ As explained by Williams and McGarrity:

This means that neither the information, answers given or documents produced by a person, nor any information, document or things obtained as a direct or indirect consequence of giving the information, answers or producing the document, is admissible against the person in civil or criminal proceedings.¹⁷

2.18 However, Williams and McGarrity noted that there are several exceptions to this immunity:

The information, answer, document or thing may be used in proceedings for an offence under the BCII Act or the Criminal Code Act 1995 (Cth) relating to the failure by a person to comply with a notice issued by the ABC Commissioner, the failure to take an oath or affirmation when requested by the ABC Commissioner or an assistant, the failure to answer questions relevant to the investigation when attending as required by the notice, the provision of false or misleading information or documents or the obstruction of a Commonwealth official.¹⁸

2.19 The ACTU pointed out that section 53(2) does not protect the right to silence undermined in section 52.¹⁹ The ACTU also highlighted that the effect of section 53 is for compliance powers to be most frequently used to interview people who are not suspected of doing anything wrong.²⁰ The submission referred to data which showed that out of 85 examinations, 22 were closed with no proceedings.²¹

15 Professor George Williams and Nicola McGarrity, Submission 6, p. 255 and ABCC *Report of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2008* available at <http://www.abcc.gov.au/NR/rdonlyres/36149C0F-B6C9-4AC7-B2C2-34379BA26C2E/0/CPowersReportSep08.pdf> accessed 14 November 2008.

16 *BCII Act 2005*, p. 48.

17 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 260.

18 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 260.

19 ACTU, *Submission 15*, p. 9.

20 ACTU, *Submission 15*, p. 10.

21 ABCC, *Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 March 2008*, p. 3.

2.20 Williams and McGarrity noted that section 54 is an adjunct to the 'use' and 'derivative use' immunities in section 53(2) and that it protects a person from prosecution on the basis that:

...he or she violated another law, or caused damage to a third party, by the mere fact of giving information to the ABCC. For example it would apply where another piece of legislation makes it an offence to disclose otherwise confidential information.²²

2.21 They noted this is important because 53(2) does not cover such situations. However, they stated that:

s 54 does not protect a person from proceedings arising out of the *content* of the information, answers or documents that he or she provided to the ABCC. It is this content that the privilege against self-incrimination is chiefly concerned with, and s 54 is a less significant safeguard than s 53(2) in protecting that privilege.²³

2.22 Williams and McGarrity concluded that there has never been sufficient justification in the building and construction industry in regard to the investigation of industrial matters for the abrogation of the important common law principle of privilege against self-incrimination.²⁴

2.23 Their submission also highlighted that the investigatory power can be applied to an extremely broad range of people including:

Workers in the building industry under no suspicion of having acted unlawfully; innocent bystanders; the families (including children of any age) of workers in the building and construction industry; journalists and academics; and to take what might seem a farfetched example, a priest in relation to what someone has told them in the confession box.²⁵

Severe penalties

2.24 Williams and McGarrity's final point in relation to the investigatory powers is that a person may be subjected to criminal penalties if he or she fails to provide the information, documents or attend to answer questions as required by a notice.²⁶ The maximum penalty is six months imprisonment.²⁷ They noted that the Committee on Freedom of Association of the International Labour Organisation (ILO) has expressed concerns and continues to do so, about this provision when considering a complaint brought by the ACTU in March 2004. It noted that:

22 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 260.

23 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 260–261.

24 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 259.

25 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 262.

26 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 262.

27 *BCII Act 2005*, p. 47.

As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.²⁸

2.25 Further concerns of the ILO will be detailed in chapter three.

Committee comment

2.26 The committee notes the legal analysis provided by Professor Williams and Ms McGarrity regarding the investigatory powers, in particular, the concerns raised in the following areas:

- the low investigatory threshold of 'relevant to an investigation';
- the use of powers being dependent on the discretion and goodwill of the holder of the power which is at odds with the rule of law principle that a power should be limited by law to its justifiable uses and not left subject to the discretion of whoever uses it;
- the abrogation of the important common law principle of privilege against self-incrimination;
- the ability to override secrecy provisions of any other law thus elevating the ABCC above the protection of national security;
- overriding the right to silence and this not being protected;
- the exceptions to immunities;
- the broad range of people the investigatory powers can be applied to;
- the severe penalty of facing a six month gaol term for failing to comply with a notice which cannot be mitigated to a fine which the ILO has requested the government to amend; and
- the finding of the Federal Court that a legal representative can be prevented from acting for more than one person giving evidence to the ABCC.

2.27 The committee points out that in the latest report on the exercise of compliance powers by the ABCC, out of 121 examinations only 67 have been legally represented.²⁹

2.28 The committee also notes the case in point of the first person to be charged with failing to cooperate with the ABCC, Mr Noel Washington, a senior official with

28 International Labour Organisation. Committee on Freedom of Association, Report No 338 (Case No. 2326): available at: <http://www.ilo.org/ilolex/english/casframeE.htm> accessed 27 October 2008.

29 ABCC Report of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2008 available at: <http://www.abcc.gov.au/NR/rdonlyres/36149C0F-B6C9-4AC7-B2C2-34379BA26C2E/0/CPowersReportSep08.pdf> accessed 28 October 2008.

the CFMEU. The ABCC requested that Mr Washington attend to give evidence about a union meeting and he refused to attend. As the case is continuing the committee will only make reference to it as an example of action being taken against an individual where they could face a six month gaol sentence.³⁰

Are the powers unusual and are they appropriate?

2.29 Some submissions stated that the powers of the ABCC are neither unusual nor unwarranted. As an example, it was pointed out that those working in the finance industry are the subject of equally strict provisions. Others stated that the powers are anti-democratic and breach international labour conventions.

2.30 Williams and McGarrity explained that at first glance the investigatory powers of the ABCC and bodies like the ACCC, ATO and ASIC may appear similar, but that on closer inspection there are important differences in the investigatory powers. Taking the ACCC as an example:

- the *Trade Practices Act 1974* (TPA) recognises that the confidentiality of some documents should be maintained, for example, cabinet documents and documents containing information which is the subject of legal professional privilege. Section 52(7) of the BCII Act does not include such an exemption;
- the penalty for failing to comply with a notice issued by the ACCC or providing information or evidence that is false or misleading is either a fine or imprisonment for 12 months. The BCII Act provides no option of a monetary penalty; and
- judicial review under the *Administrative Decisions (Judicial Review) Act 1977* is available in relation to a decision by the ACCC to exercise its investigatory powers but no such review is included in the BCII Act.³¹

2.31 Williams and McGarrity concluded that the powers in the BCII Act are inappropriate and detailed three significant factors to explain this view.

2.32 First, the submission pointed to the broad scope of the ABCC to exercise its investigatory and coercive powers and the lack of a prohibition on the use of the powers to investigate minor or petty contraventions.³²

2.33 This point was supported by The Hon Murray Wilcox QC in his discussion paper. It was noted that section 52 does not require the issuing officer of a summons to 'make a judgement as to the need to make that investigation, having regard to the

30 For further information on the case the following websites, among others, provide background: <http://www.cfmeuvc.com.au/storage/documents/NW%20download.pdf> and <http://www.abcc.gov.au/abcc/Prosecutions/CurrentCourtCases/CrusevCFMEUandWashington.htm> accessed 28 October 2008.

31 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 270.

32 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 272.

nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from this particular person'.³³ He noted the desirability to impose an express obligation to consider these matters and for another, who is not a subordinate, to concur.³⁴

2.34 Second, the ABCC deals with breaches of the civil, not criminal law. The submission by Williams and McGarrity noted that only two criminal offences are created by the BCII Act, both of which relate to procedural matters: the failure of a person to comply with a notice issued by the ABCC, and, the recording or disclosure of protected information that a person such as an employee of the ABCC has obtained in the course of their employment. It highlighted that the target of the legislation, unlawful industrial action, is dealt with by way of civil sanctions and suggested that the types of powers held by the ABCC should be appropriate for the contraventions it is required to investigate. The submission also argued that the functions of the ABCC are not comparable to those of the ACCC.³⁵ In summary:

The ABCC is primarily responsible for monitoring, investigating and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements. Investigatory powers of the type bestowed on the ABC Commissioner had previously been unheard of in the industrial context. In this light, the powers possessed by the ABC Commissioner are not only extraordinary, but unwarranted. Extraordinary powers of this kind should not be vested without adequate checks and balances, and even then should only be given to a body required to deal with serious criminal conduct. Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.³⁶

2.35 Third, the submission highlighted the selectivity of the ABCC's jurisdiction. It noted there is nothing about the 'lawlessness' identified by the Cole royal commission which is unique to the building and construction industry. It found that the existing non-industry specific bodies had inadequate powers to enforce Commonwealth industrial law. The submission posited why this is not a problem that needs to be addressed for all industries? This selectivity differs from bodies such as ACCC where they have jurisdiction over all persons and organisations that contravene the TPA.³⁷

2.36 Mr Wilcox explained in his discussion paper that it is commonplace for an unwilling witness to be subpoenaed to give evidence or produce documents to a court and that this has not been considered a human rights issue. In fact he added that the

33 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

34 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 31.

35 Professor George Williams and Nicola McGarrity, *Submission 6*, pp.273–274.

36 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 274–275.

37 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 275.

power to compel attendance may assist a witness to avert criticism. However, he did note that this action:

...understandably causes resentment amongst building workers that they, but not workers in almost any other industry, can be summoned to give evidence about work-related events, with a view to building up a case against their co-workers and/or their union.³⁸

What is the alternative?

2.37 Mr Wilcox noted in his discussion paper that the Workplace Ombudsman (WO) will be folded into Fair Work Australia. He put the view for comment that the WO already investigates and, if appropriate, prosecutes any breaches of workplace law and the success of the WO could indicate that there is no need for the powers of compulsory interrogation conferred by the BCII Act.³⁹

Committee comment

2.38 The committee majority notes that Professor Williams argues that context is important when considering the powers in the BCII Act. He asks whether these powers are appropriate in an industrial relations and industry context where the ABCC focuses on breaches of civil and not criminal law. As argued and concluded by the committee majority in previous reports, the evidence confirms that industry specific legislation is not appropriate in this context and therefore not warranted.

2.39 The committee is encouraged by the discussion paper released by Mr Wilcox which raises the question as to whether the existing industrial relations machinery should be sufficient for the industry.

2.40 Although the committee majority does not agree with industry specific legislation in principle, given that it exists it is important to ensure that adequate safeguards are in place to ensure that these broad powers are not used unfairly.

Are there adequate safeguards?

2.41 Given that the powers exist and that they are wide-ranging and have serious consequences including possible gaol terms, a basic question is whether adequate safeguards have been built into the legislation.

2.42 Organisations such as AMMA stressed there are significant qualifications to the powers contained in sections 52 and 53 of the Act in that:

- only the ABC Commissioner can make a request under section 52;

38 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

39 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 20.

- the ABC Commissioner must have reasonable grounds to believe a person has information or documents, or is capable of giving evidence relevant to an investigation before using its coercive powers;
- a person attending before the ABC Commissioner may choose to be legally represented; and
- any evidence given, or information obtained, by the ABCC is inadmissible against the witness in future proceedings.⁴⁰

No need for approval to exercise the powers

2.43 Williams and McGarrity noted that although the power rests entirely in the hands of the ABCC Commissioner, 'He or she is not required to obtain the approval, such as a warrant, of either a member of the Commonwealth executive or the judiciary'.⁴¹

Perceptions of political influence

2.44 Section 15(1) of the Act provides that the ABCC Commissioner is appointed by the Minister for Employment and Workplace Relations and they hold 'office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister'.⁴² As pointed out in the committee's 2004 report, the ability for the executive to influence the exercise of the powers has contributed to criticism that the agency could be subject to a high level of political direction.⁴³ Mr Wilcox raised this question of too much or too little ministerial direction and control as an issue in his discussion paper.⁴⁴

2.45 Williams and McGarrity suggested introducing an independent and apolitical element such as the inclusion of a Federal Court judge in the approval process for the exercise of the investigatory and coercive powers. They argued that such a step is appropriate given the serious consequences of the use of these powers such as the gaol term and the abrogation of the right to silence and the privilege against self-incrimination.⁴⁵

2.46 For instance, they pointed out that judicial approval is required for the exercise of the Australian Secret Intelligence Organisation's investigatory powers and that the threshold for exercising these powers is higher than for the ABCC, for

40 Summary of qualifications provided by AMMA, *Submission 4*, p. 13.

41 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 264.

42 *BCII Act 2005*, p. 17.

43 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004, pp. 56-57.

44 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 25.

45 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 264.

example, that the warrant must 'substantially assist' an investigation rather than being 'relevant' to an investigation. They further argued that as judicial oversight is appropriate under counter-terrorism laws:

It is difficult to see what the justification could be for excluding such oversight in regard to the ABC Commissioner's exercise of his or her investigatory powers.⁴⁶

2.47 There is no mechanism in the Act for either internal or external review of the merits of a decision to exercise the ABCC's investigatory powers and there is only limited scope for judicial review of the legality of such a decision. Williams and McGarrity explained:

Because Parliament has excluded judicial review under the ADJR Act, it is not possible to challenge a decision by the ABC Commissioner to exercise his or her investigatory powers on the grounds set out in ss 5 and 6 of that Act.⁴⁷

2.48 They noted that the review of the legality of the decision will still be available under the constitutional writs on section 75(v) of the Constitution but this is restricted to challenges based on a 'jurisdictional error'.⁴⁸

2.49 The importance of judicial review has been accepted by a number of independent bodies, including the Cole royal commission and the ILO's Committee on the Freedom of Association which noted:

The Committee considers that the expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions. The Committee therefore requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to such interference and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents.⁴⁹

2.50 Submissions noted that given the nature and scope of the investigatory powers of the ABCC, the methods of oversight referred to by the royal commission are inadequate, in particular the requirement for an annual report or the ability to make a complaint to the Commonwealth Ombudsman. In summary:

In the absence of adequate safeguards, the ABC Commissioner's investigatory powers have the potential to severely restrict basic democratic

46 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 266.

47 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 266.

48 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 266.

49 Report available from: <http://www.ilo.org/ilolex/english/caseframeE.htm> accessed 28 October 2008.

rights such as freedom of speech, freedom of association, the privilege against self-incrimination and the right to silence.⁵⁰

2.51 Mr Wilcox also noted there is no significant external supervision of the ABCC and he listed the Victorian Office of Police Integrity model which is monitored by the Special Investigations Monitor as a possible model. He explained that people can complain to the Commonwealth Ombudsman but this will be one of thousands of complaints involving the full range of Commonwealth agencies. He highlighted that any action the Ombudsman could take would be after the event. He concluded that if the new division of Fair Work Australia is to be granted coercive powers then subjecting it to external monitoring seems essential.⁵¹

Burden placed on recipient of summons

2.52 Mr Wilcox also noted the compulsory interrogation powers impose a burden on the recipient of the summons. Quite apart from the emotional distress of receiving a notice to attend a formal interrogation to answer questions that involve workmates, there is the financial burden as the recipient is left to bear any lost wages and the expense of obtaining legal assistance.⁵²

Committee comment

2.53 The committee majority notes that Professor Williams argues that increased oversight is not necessarily the answer to powers which are already 'exceptional and unwarranted' and the committee concurs with this view.

2.54 The committee majority is encouraged by Mr Wilcox's observations that the coercive powers in current legislation should be subjected to external monitoring as a safeguard against misuse. As the ABCC will remain in force until 2010, the committee majority recommends that such safeguards be put in place.

Recommendation 1

As the office of the Australian Building and Construction Commissioner will remain in force until 2010, the committee majority recommends that appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency.

50 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 268.

51 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 33.

52 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

The importance of the building and construction industry to the economy

2.55 Submissions, which argued for the retention of industry specific legislation, pointed to reports showing increased productivity and levels of industrial peace and made a causal link that the BCII Act and ABCC are responsible for improvements. The committee majority questions whether such a causal link can be made.

2.56 Australian Bureau of Statistics (ABS) data shows a reduction in time lost in the construction industry.⁵³ However, Mr Wilcox pointed out that the ABS statistics also show substantial reductions in time lost in other industries over the period 1996-2007 leading to the conclusion that community-wide factors may be responsible for most, if not all, of the reduction of time lost in the construction industry.⁵⁴ Mr Wilcox also pointed to the 2007 Allen Consulting Group report which explained:

The number of industrial disputes in the construction industry has been very low since 2000, and particularly low in the past year...With the exception of a couple of significant spikes in the number of days lost in the mid 1990s, the long term trend has been towards a declining number of industrial disputes in the industry.⁵⁵

2.57 The committee majority notes the importance of the industry to the economy as it directly accounts for about 7.5 per cent of GDP, provides 940,000 jobs and has an average employment growth rate of seven per cent with most of this concentrated in non-residential construction.⁵⁶

2.58 Submissions highlighted the reports undertaken by the consulting firm Econtech over recent years which show that since the passage of the BCII Act:

- GDP is 1.5 per cent higher than it otherwise would be;
- the CPI is 1.2 per cent lower than it otherwise would be;
- the price of dwellings are 2.5 per cent lower than they otherwise would be; and
- consumer living standards have improved, reflected in an annual economic welfare gain of \$5.1 billion.⁵⁷

2.59 The validity of the data and the modelling used in these reports has been questioned. In its 2004 report, this committee noted the limited scope of the research

53 ABS, *Industrial Disputes, Australia*, Category 6321.0.55.001, December 2007, Table 2b.

54 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 17.

55 The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, 21 August 2007, p. vi.

56 Reserve Bank of Australia, *Statement of Monetary Policy*, 13 August 2007, p. 44.

57 MBA, *Submission 5*, pp. 6-7.

and questioned the inferences drawn.⁵⁸ This questioning was continued recently by Senator Doug Cameron at Senate estimates hearings on 23 October 2008 where he questioned the ABCC Commissioner about an error in the data used in the 2007 Econotech report. Commissioner John Lloyd read from an ABCC Media Backgrounder which stated:

Econotech reviewed its use of the Rawlinsons data and removes anomalies. In the 2007 report some data was inadvertently juxtaposed in manually extracting it from Rawlinsons hard copy publications. The recording of incorrect data for 2007 has been rectified.⁵⁹

2.60 Mr Lloyd further explained the reason for the error:

The reason for the change in the presentation of the data in that regard is that the base year changed because there is an apparent break in the Rawlinsons data series from 2003 to 2004. Some of the cost series spiked at the time of the series break, and that is why they have changed it. They are the experts in the Rawlinsons data. Rawlinsons data is a very thick, big document and that is why it was changed in that manner.

2.61 Senator Cameron further questioned Mr Lloyd about examples which may have been provided to Econotech by the ABCC to use in the modelling which would contribute favourably to the findings of productivity improvements. Mr Lloyd stated that he was not sure if the example had been fed into the model but explained that the model takes different variables of movements and various economic data.⁶⁰

Committee comment

2.62 The committee majority makes no comment on issues raised about the veracity of the data used in the Econotech reports except to note that the findings are not universally accepted. The committee also notes the findings of reduced time lost in other industries which bring into question the causal link often cited between improvements in the industry and the BCII Act and the ABCC. The committee notes the lack of evidence to support this link and is encouraged that this linkage too is being questioned by Mr Wilcox.

58 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004, pp. 25–29.

59 Education, Employment and Workplace Relations Committee, Supplementary Budget Estimates, *Proof Hansard*, 23 October 2008, p. 132; and Media Backgrounder available at: <http://www.abcc.gov.au/NR/rdonlyres/9D99CD5C-8C6E-4242-B533-66FE7897FD20/0/MB20080801ProductivityintheConstructionIndustryContinuestoImprove.pdf> accessed 30 October 2008.

60 Education, Employment and Workplace Relations Committee, Senate Supplementary Budget Estimates, *Proof Hansard*, 23 October 2008, p. 134.

Senator Gavin Marshall
Chair

Coalition Senators' Report

Introduction

The *Building and Construction Industry Improvement Act 2005* (the BCII Bill) was a direct outcome of the recommendations of the Cole Royal Commission. It should be noted that the government majority on the committee remains reluctant to accept the veracity and the findings of the royal commission. Then Opposition senators rejected the findings in two previous reports of this committee in 2004¹ and again in 2005.²

Submissions from employer organisations reminded the committee that a royal commission is the ultimate form of inquiry and is never established lightly.³

The Cole Royal Commission was comprehensive and was conducted over 12 months with 171 public sitting days, 16,000 pages of transcript, 765 witnesses, 1900 exhibits and 29 general submissions.⁴ The then Opposition sought to discredit the findings by Cole of widespread sabotage of industry productivity through strikes and intimidation, but the evidence was unassailable.

The findings of the royal commission cannot simply be dismissed. As noted by Hon Kevin Andrews MP, Minister for Employment and Workplace Relations in 2004:

The royal commission found the building and construction industry is characterised by illegal and improper payments, threats of violence, chronic failure to honour legally binding agreements, contempt for commission and court rulings and has a culture of coercion, harassment and intimidation. This industry has been and continues to be crippled by lawlessness.⁵

The commission recommended structural and cultural change and it considered that both strong regulation and a strong regulator were required to effect change. Cultural change takes much longer to effect than structural change, and the more cultural change needed the more time it will take.

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- 1 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004.
 - 2 Senate Employment, Workplace Relations and Education References Committee, *Inquiry into the Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, May 2005.
 - 3 Civil Contractors Federation (CCF), *Submission 2*, p. 4.
 - 4 AMMA, *Submission 4*, p. 11.
 - 5 Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 25 March 2004, p. 27297.

Are we there yet?

Submissions stressed that as the ABCC has been in operation for only three years, the reform process is not yet complete.⁶ The cultural changes required in the industry have not been fully embedded. The CCF submitted:

A history of decades of bad behaviour, intimidation and coercion will hardly be resolved in the 3 years since the ABCC has been operating.⁷

Those supporting the retention of the ABCC point to recent reports of incidents to show a culture of intimidation and harassment still exists in the industry. These incidents highlight the continuing need for the BCII Act and the ABCC. AMMA stressed:

Industry participants are continuing to engage in unlawful and inappropriate conduct and are subject to continued investigations and court proceedings initiated by the ABCC.⁸

To illustrate that behavioural improvements have not yet been entrenched, the Civil Contractors Federation (CCF) highlighted two recent reports of intimidation and harassment:

The first incident was reported in the Melbourne Age on the 10th of September 2008 it relates to a death threat made to an executive of Bovis Lend Lease...

The second incident that has been widely reported related to the ABCC itself. The Australian on 1 September reported that ABCC inspectors were abused and intimidated on a Melbourne construction site.⁹

These instances serve to illustrate that intimidation and harassment may take years to change and will take longer to resolve than the three years the ABCC has been in operation.¹⁰ According to the CCF, behaviours have improved but that these changes may yet be transitory. They argued that the reform process is far from complete stating:

Failure to retain a tough regulator with strong investigation powers could see a return to the undesirable and non productive behaviour highlighted by the Royal Commission.¹¹

The royal commission found that previous attempts to effect cultural change in the industry were not successful. Evidence from submissions make clear that the ABCC

6 See CCF, Submission 2, p. 6; AMMA, p. 5.

7 CCF, *Submission 2*, p. 8.

8 AMMA, *Submission 4*, p. 5.

9 CCF, Submission 2, p. 9.

10 CCF, Submission 2, p. 8.

11 CCF, *Submission 2*, p. 6.

has been operating for an insufficient period of time to ensure that the change required in the industry has been embedded. Coalition senators believe that the reform process is not yet complete as evidenced by continuing inappropriate conduct and proceedings, and the powers should be retained.

The report will now turn to the benefits of the BCII Act and the ABCC for the economy and the industry.

Effect on the economy of abolishing the ABCC

Many submissions viewed the ABCC as a spectacular success and it is credited by many with restoring peace and stability to the industry. Submissions provided evidence that the BCII Act and the ABCC have led to quantifiable increases in productivity and reduced industrial disputation in the construction industry¹². The effect of abolishing the ABCC would be devastating for the commercial building sector and the flow-on effects to the economy would be substantial.

The increased productivity can be seen in recent reports by Econtech. The report shows the following significant improvements:

- 7.3 per cent productivity gain in commercial building relative to residential building since 2004;
- 10 per cent addition to labour productivity in the construction industry due to the ABCC and associated reforms; and
- 10.5 per cent out performance in construction industry labour productivity compared to predictions based on historical performance to 2002.¹³

In its 2008 report, Econtech reaffirmed the ABCC's role in improving productivity in the construction industry with significant benefits for the national economy. The report highlights the following broader effects:

- GDP is 1.5 per cent higher than it otherwise would be;
- The CPI is 1.2 per cent lower than it otherwise would be;
- The price of dwellings are 2.5 per cent lower than they otherwise would be; and
- Consumer living standards have improved.¹⁴

Overall Econtech found an annual economic welfare gain of \$5.1 billion from the ABCC.¹⁵ The CCF highlighted that a 'break out' of costs and charges in the industry would be a threat to inflation and therefore damaging to the economy.¹⁶

12 See CCF Submission, 2, p. 3.

13 MBA, *Submission 5*, p. 6.

14 MBA, *Submission 5*, pp 6-7.

The Econtech study also concluded that the ABCC and the reforms to the construction industry have led to a significant reduction in the days lost in the industry due to industrial action.¹⁷

AMMA provided data sourced from the ABS on the decline in industry dispute levels, noting the dramatic decline since 1996 which had 882.2 days lost per thousand to 153.8 in 2005 and 10.1 in 2007.¹⁸

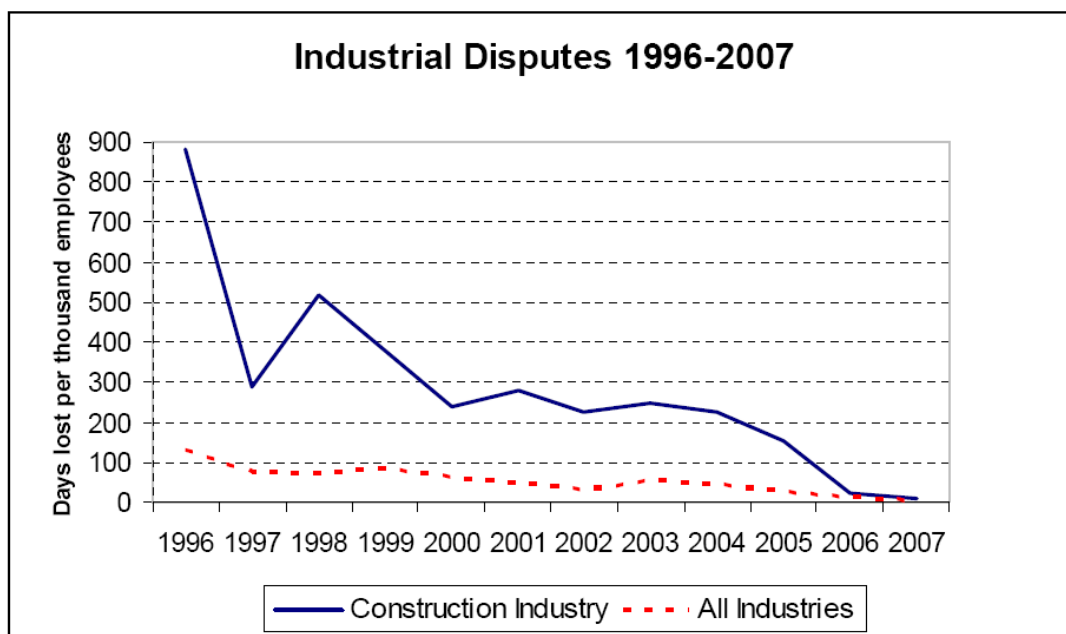


Table 1: Industrial Disputes 1996-2007¹⁹

The CCF submitted that industrial harmony is critical for their members and smaller contractors are particularly vulnerable to industrial disruption, intimidation and coercion which are all matters the ABCC deals with.²⁰

The Ai Group has argued that the BCII Act and the ABCC have been critical factors in improving the industry's culture, reducing time lost and other project costs, tempering unlawful union behaviour and limiting unlawful industrial action and

15 ABCC Media Statement, 'Construction Industry Productivity: 2008 Report Card', 1 August 2008.

16 CCF, *Submission 2*, p. 10.

17 ABCC Media Backgrounder, 'Productivity in the Construction Industry continues to Improve', 1 August 2008.

18 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 19.

19 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 19.

20 CCF, *Submission 2*, p. 2.

greatly increasing productivity. They emphasised that it is important that these gains are not lost. Ai Group Chief Executive Ms Heather Ridout has argued:

Currently the construction industry is experiencing a period of unprecedented industrial harmony. The industry has never been a better place in which to work and invest as is evident from the record low level of industrial disputation, high wages growth and higher productivity.²¹

In the 2006-07 Annual Report of the ABCC the commissioner reported:

The impact of the Office of the Australian Building and Construction Commissioner (ABCC) on the building and construction industry is significant. Industrial relations conduct has improved markedly. Industrial disputation has fallen to all time low levels. The key measure of industrial disputation is 4,200 per cent lower in 2007 compared to 2001 – the year the Cole Royal Commission commenced.²²

Effect on the workplace

Econtech's 2008 report stated that case studies found the ABCC and industrial relations reforms have led to the following industry improvements:

- significant reduction in days lost due to industrial action;
- less abuse and the proper management of OH&S issues;
- proper management of inclement weather procedures;
- improvement in rostering arrangement; and
- cost savings stemming from the prohibition on pattern bargaining.²³

MBA highlighted the increase in construction wages compared to other sectors and calculated that workers in the construction industry

...have increased aggregate earnings by close to \$18 million per annum via the benefits of fewer working days lost in a more harmonious industrial relations environment.²⁴

The Hon Kevin Andrews MP has noted that the presence of the ABCC has changed the practices on worksites. Costly strikes and industrial action have all but disappeared and projects are being completed without costly delays.²⁵

21 *Media Release*, Ai Group, 'Ai Group welcomes consultative approach on ABCC transition, 22 May 2008.

22 Office of the ABCC, Annual Report 2006-07, Commissioner's Review, available at: <http://www.abcc.gov.au/abcc/Reports/AnnualReport0607/ABCCCommissionersReview.htm> accessed 20 November 2008.

23 Econtech, Economic Analysis of Building and Construction Industry Productivity: 2008 Report, 30 July 2008, p. iii.

24 MBA, *Submission 5*, p. 7.

The CCF summed up the views in this area:

...the ABCC and the legislation it enforces has led to quantifiable increases in productivity in the construction industry and that its actions have underpinned cultural change which is vital for Australia's long term prosperity.²⁶

Placing billion dollar projects at risk

Organisations such as AMMA are concerned about the nature of the practices and conduct in engineering construction work which is engaged heavily in capital intensive construction projects. They advised that as at April 2008 there were 97 minerals and energy projects at advanced stages of development with a total capital expenditure of \$70.5 billion.²⁷ AMMA contends that the abolition of the BCII Act and the ABCC will put at risk billion dollar investment decisions for major minerals and energy projects.²⁸ AMMA contends:

...that if the building and construction industry returned to the industrial environment of the 1990s, project deadlines, budgets and contractual obligations would be put at risk, costs would escalate and investment confidence would deteriorate.²⁹

The CCF highlighted that any return to disputation and lost productivity may also undermine the government's commitment to infrastructure development.³⁰

Coalition senators believe that the BCII Act and the ABCC should be judged on the results achieved and, on this criterion, they would understandably be judged as a success by many in the industry.

Powers

Submissions stated that the unusual powers conferred by the BCII Act are regrettably necessary as a response to the culture of intimidation and harassment in the industry. The vast majority in the industry believe the powers of the ABCC are appropriate and have been exercised with discretion³¹ and that there are adequate safeguards in place.

25 The Hon Kevin Andrews MP, 'Union rule remains the worst option', *Australian Financial Review*, 18 August 2008, p. 71.

26 CCF, *Submission 2*, p. 3.

27 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 8.

28 AMMA, *Submission 4*, p. 5.

29 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 10.

30 CCF, *Submission 2*, p. 3.

31 Ai Group, *Submission 12*, p. 9.

The Australian Industry Group emphasised that the powers of the ABCC are vital to achieve cooperation in the industry. They noted that prior to the ABCC unions officials routinely refused to provide information or answer questions and advised their members to do the same. Ai Group argued that:

Prior to the enactment of the BCII Act and the establishment of the ABCC, a culture of intimidation in the industry made it very difficult for investigators to gain the cooperation of those affected and the rule of law was severely diminished.³²

Penalties

AMMA noted that the penalties which result from an act of non-compliance are in place to ensure that investigations are taken seriously and that there are no barriers to addressing unlawful and inappropriate conduct. Coalition senators note that ABCC reported that the evidence of 17 witnesses who were compelled to attend and answer questions between 1 October 2005 and 31 March 2008 were critical to the relevant court proceedings.³³

Safeguards

Submissions emphasised the protections in the BCII Act. AMMA contended that the coercive powers are adequately balanced by relevant protections, including the right to legal representation and inadmissibility of any evidence given or information obtained against a person in future proceedings. They also noted that reasonable grounds must be present before a person can be subjected to the coercive powers.³⁴

The CCF highlighted privilege against self incrimination and that these protections in the Act contain both 'use' and 'derivative use' immunities.

Put simply the evidence obtained through compulsion cannot be used against the person to directly found proceedings against that person. Nor under derivative use immunity can a person have proceedings brought against them, by something derived from the evidence obtained.³⁵

Regarding the investigatory powers and the right to legal representation, the Ai Group submission argued:

There has been much misinformation circulated concerning a witness' rights to choose his/her own legal representative following the Federal Court's *Bonan v Hadgkiss* decision. In that case the deputy ABCC excluded a legal representative because that representative had already acted for a different

32 Ai Group, *Submission 12*, p. 9.

33 ABCC, Report on the Exercise of Compliance Powers 1 October 2005 to 31 March 2008, p.3.

34 AMMA, *Submission 4*, p. 4.

35 CCF, *Submission 2*, p. 15.

witness in another examination related to the same investigation. The federal court upheld the Deputy ABCC's decision.³⁶

The CCF noted that the Administrative Review Council report, *The Coercive Information-gathering Powers of Government Agencies*³⁷, contains best practice principles. The CCF pointed out that the ABCC reviewed its procedures against these and found that the legislation and procedures complied with all the principles applicable to its use of powers.³⁸ It also advised:

Additionally, the ABCC also published detailed guidelines on its use of its powers which is at odds with the claim in the Second Reading Speech that the ABCC Commissioner 'determines his own practices with a high level of secrecy'.³⁹

Accountability

In relation to the accountability of the ABCC, the CCF offered the following points:

- the ABCC like a number of Federal agencies is subject to review by the Commonwealth Ombudsman;
- the ABCC's own actions have been the subject of judicial overview;
- the ABCC Commissioner and senior staff appeared before the Senate Education, Employment and Workplace Relations Committee as part of the estimates process; and
- the Minister for Employment and Workplace Relations can be asked questions in Parliament about the activities of the ABCC.⁴⁰

Coalition senators accept that protections provided by the BCII Act are substantive. They recognise that the powers comply with best practice principles in the ARC report which also states these protections are not present in all acts with similar compulsory powers.⁴¹ Coalition senators also emphasise the various accountability mechanisms which apply to the ABCC and notes that the ABCC publishes regular reports on the use of its compliance powers.

36 Ai Group, *Submission 12*, p. 9.

37 Administrative Review Council (ARC), *The Coercive Information-gathering Powers of Government Agencies*, Report No 48, May 2008.

38 CCF, *Submission 2*, p. 16.

39 CCF, *Submission 2*, p. 16.

40 CCF, *Submission 2*, p. 17.

41 ARC, *The Coercive Information-gathering Powers of Government Agencies*, Report No 48, May 2008, p.49.

Industry specific legislation is not unique or unusual

The CCF noted that industry-specific legislation is not unique nor is it unusual and provided the following examples:

- those dealing with public health – for example regulation of health providers, pharmaceuticals;
- regulation of particular professions by the industry and government for example, lawyers and accountants;
- the financial services industry which includes those providing advice or services, the banking industry generally through the granting of licences and the financial markets;
- regulation of the 'education and further education industry' such as education providers including Acts which specifically establish universities, colleges and institutions and their governance structures and accountability.⁴²

The CCF noted that many regulators such as ASIC, the ATO and the ACCC have the power to compel people to attend to provide answers, information and documents. They referred the committee to the report by the ARC which includes a comprehensive list.⁴³

The Master Builder's Association (MBA) provided the committee with a table to show that the powers of the ABCC are not unusual and not unique to the ABCC. They explained the compliance power is modelled on the ACCC and is similar to the powers used by the ASIC.⁴⁴

Conclusion

Coalition senators believe that the evidence before the inquiry compellingly suggests that the ABCC has contributed to the increased productivity and levels of industrial peace evident in the building and construction industry today.

However, the job is not yet done. Recent examples show the remnants of a culture of intimidation and harassment still exist in the industry. The ABCC has proved its worth in checking the abuse of union power and reducing unlawful conduct, and it has contributed to increases in industry pay rates.

The benefits of the ABCC to not only the industry but the whole economy are clearly visible in the Econtech reports with the ABCC, in conjunction with related industry reforms, adding about 10 per cent to productivity in the industry and 1.5 per cent to GDP.

42 CCF, *Submission 2*, p. 12.

43 CCF, *Submission 2*, p. 13.

44 MBA, *Submission 5*, pp. 9–11.

These important gains should not be placed at risk at any time, particularly in these uncertain economic times.

Coalition senators do not support the thrust of the Government senators' majority report. Their report appears to argue for the principles underpinning the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* but then, incongruously, it recommends that the bill not proceed. This may reflect ambivalence – even division – in the ranks of Government senators about the BCII Bill and the ABCC. The position of Coalition senators is clear: we reject this bill.

In addition, Coalition senators do not support Recommendations 1 and 2 of the Government senators' majority report.

Senator Gary Humphries

Senator Mary Jo Fisher

Deputy Chair



Senator Michaelia Cash

Minority Report by the Australian Greens

The *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* is a simple piece of legislation. It has one key clause: the repeal of the *Building and Construction Industry Improvement Act 2005* (the BCII Act).

The BCII Act is the previous government's industrial relations agenda writ large. It is legislation that breaches workers fundamental rights, restricts collective bargaining and freedom of association and provides excessive and extreme penalties for breaches of its provisions.

The Majority Report sets out the background to the BCII Act and includes reference to the Cole Inquiry and the 2004 Senate Committee Inquiry into the future of the construction industry. The Committee Majority also provides a comprehensive discussion of the key issues of concern with the Act and the office of the Australian Building and Construction Commissioner (ABCC) raised by the submissions.

We will not repeat the discussion but we do wish to make additional comments to highlight the key reasons why the Australian Greens believe there is no justification for this legislation to continue to be on the statute books and why we have described these laws as "some of the most pernicious ever to have passed through this place".¹

The Australian Greens have consistently said that it is unacceptable to have workplace relations laws that take away the right to silence, deny people their choice of lawyer, provide powers to compel evidence with the possibility of gaol for non-compliance, and impose severe restrictions on the rights of workers to organise and bargain collectively.

As the Majority report details, the ABCC has extraordinary coercive and investigatory powers including powers to compel information, documents or the giving of evidence. Of particular concern is the breadth of these powers and the low investigatory threshold, given the extreme consequences for not complying with a notice from the ABCC, that is, imprisonment. We note too the infringement of civil liberties with the restriction on the right to silence. The Australian Greens feel strongly that such powers are not appropriate for the regulation of any workplaces.

The Majority Report details the evidence provided in submissions that demonstrate the important difference between agencies such as the Australian Competition and Consumer Commission and the ABCC. Of note are differences such as the option of monetary penalties and decisions being reviewable. There is also no need for the ABCC to obtain a warrant before it exercises any of its extensive powers. We particularly note, as does the Majority Report, the conclusion by Professor George Williams and Nicola McGarrity in their submission that the BCII Act has provisions that:

¹ Senator Rachel Siewert, Second Reading Speech, *Senate Hansard*, 28 August 2008, p. 3983.

"elevate the ABCC, and its objective of elimination of unlawful conduct in the building and construction industry, above even the protection of national security."²

There is just no genuine justification for a body regulating workplaces to have powers that exceed those of our national security agencies. This is an Act that singles people out on the basis of their work, not just their actions.

We have also been very concerned about the operations of the ABCC over the last few years. The Majority Report outlines evidence which supports our concerns that the ABCC has not been impartial in exercising its responsibilities and in fact has been turning a "blind eye" to unlawful employer actions. We are also concerned that the ABCC has acted in an unnecessarily intimidating way towards workers who themselves may not have breached the Act in any way.³

The other key concerns we have is the restrictions the legislation places on collective bargaining and freedom of association and the potential for adverse occupational health and safety consequences. The Combined Construction Union and ACTU submissions both detail how the Act breaches the International Labour Organisation convention on freedom of association including the right to organise and collectively bargain.⁴ Australia is a signatory to the relevant ILO Conventions and all Governments should endeavour to ensure the legislation they propose to the Parliament satisfies our international obligations.

Freedom of association is a fundamental right. An integral part of that right is the right to take industrial action. A key means by which the BCII Act prohibits industrial action is the provision for financial penalties of up to \$110 000 for unions and \$22 000 for individuals who engage in "unprotected" strike action. The BCII Act all but abolishes the right to take industrial action for workers in the building and construction industry.

As the Combined Construction Unions indicate:

" the combined effect of [the *Workplace Relations Act* provisions] and the BCII Act, which effectively ensures that virtually all forms of unprotected industrial action are unlawful and subject to harsh penalties, adds a coercive dimension to the regulation of the workplace. Almost any departure from ordinary work patterns in the construction industry which

- (a) does not qualify as 'protected action' for any reason
- (b) has not been authorised in advance and in writing by the employer; or
- (c) does not meet the strict definition of health and safety disputes which are excluded from the definition of building industrial action

will attract a penalty."⁵

² Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

³ See for example, Paul Ruiz, *Submission 1*.

⁴ CCU, *Submission 13*, pp. 15-21 and ACTU, *Submission 15*, pp. 15-16.

⁵ CCU, *Submission 13*, p. 14.

No other workers in Australia are subject to such harsh individual civil penalties for exercising their fundamental to right withdraw their labour.

The ACTU and Combined Construction Unions submissions also detail the potential for adverse occupational health and safety consequences that may flow from the provisions of the BCII Act.⁶ In particular, they demonstrate that while under the BCII Act workers can stop work if they have reasonable concern for their safety, it is the employees that have the burden of proof under these provisions. The prospect of heavy penalties for a worker making the wrong judgement places a disincentive on workers to be active in identifying unsafe work practices. It is unacceptable in an industry as dangerous as the building and construction industry for legislation to act counter to achieving the highest standards of health and safety practice.

The BCII Act does not just trample on the rights of workers, it is also unnecessary. We agree with the submissions and the majority report that conclude that there are already adequate mechanisms for dealing with workplace and industrial issues in the Workplace Relations Act and at common law.

As Professor Williams and Ms McGarrity conclude:

"It is wrong as a matter of legal policy to confer a draconian, overbroad and inadequately checked investigatory power on a body whose principal function is to investigate civil breaches of federal industrial law in a single industry....Given such fundamental concerns, our view is that the ABCC should be abolished. We further believe that it is inappropriate to create any other body to deal only with the building and construction industry. Contraventions of industrial law by participants in that sector should be investigated by a single body with a brief to apply its powers in a non-discriminatory manner to all employers and employees across all industries."⁷

The Australian Greens do not accept the argument put forward by many of those that support the BCII Act that the Act and the ABCC is justified on the ground of perceived economic benefit. We do not believe that economic gains can justify the assault on fundamental human rights that the BCII Act perpetrates.

We also do not accept the Government's continued rhetoric about a tough "cop on the beat" for the building industry as justifying the continued singling out of building and construction workers for special treatment. Universal industrial, civil and criminal laws should be complied with and enforced on building sites as in any other workplaces.

We note the recommendations of the Majority Report for appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency and for the government to without delay address the issues identified by the International Labour Organisation. While we would support any such moves on behalf of the

⁶ CCU, *Submission 13*, pp. 10-11 and ACTU, *Submission 15*, pp. 12-15.

⁷ Williams and McGarrity, *Submission 6*, pp. 276-277.

Government, these are a poor substitute for the government not acting to repeal the BCII Act immediately.

While we agree with the most of the comments by the Government Senators in their Majority Report, we do not understand the conclusion that the Bill not be passed. There is a lack of logic in making comments that lead to the conclusion that the legislation is fundamentally flawed, breaches the rights of workers in a particular industry, and is grossly unfair but then not supporting the urgent repealing of that legislation. The reasons raised by the Majority Report for not supporting the Bill being passed are concerns about the safety bodies and the status of current investigations and the staff of the ABCC. These are matters that are easily remedied by transitional provisions. The Australian Greens would support amendments to the Bill to facilitate these matters.

The Australian Greens agree with conclusion of Professor Williams and Ms McGarrity that:

"The ABCC's investigatory powers simply have no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on political and industrial freedoms."⁸

We reiterate that the BCII Act is an affront to our democracy, and that this Parliament must ensure that the building industry is regulated just like any other industry - in a fair and just manner that balances the needs of productivity and the economy with the health, safety and democratic rights of workers.

Recommendation 1: The Bill be passed.

Senator Rachel Siewert

⁸ Williams and McGarrity, *Submission 6*, p. 279.

Appendix 1

Submissions received

| Sub No. | Submitter |
|----------------|---|
| 1 | Mr Paul Ruiz |
| 2 | Civil Contractors Federation, VIC |
| 3 | Department of Education, Employment and Workplace Relations, Cwlth |
| 4 | Australian Mines and Minerals Association, |
| 5 | Master Builders Australia |
| 6 | George Williams and Nicola McGarity |
| 7 | National Electrical & Communications Association |
| 8 | Geelong West Branch, Australia Labor Party |
| 9 | Mr Chris White |
| 10 | Electrical & Communications Association |
| 11 | Rail Tram & Bus Union |
| 12 | Australian Industry Group & the Australian Constructors Association |
| 13 | Combined Construction Unions |
| 14 | Australian Chamber of Commerce and Industry |
| 15 | Australian Council of Trade Unions, and State Trades and Labour Council |